IN THE

Uuited States Court of Appeals

Of the Ninth Circuit

JOHN BACIGALUPI, *Plaintiff in Error,* vs. THE UNITED STATES OF AMERICA, *Defendant in Error.*	No. 3664

PETITION FOR A REHEARING ON BEHALF OF PLAINTIFF IN ERROR

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To the Honorable William B. Gilbert, Presiding Judge, and the Honorable The Associated Judges of the United States Court of Appeals for the Ninth Circuit:

Plaintiff in error respectfully petitions this Honorable Court for a rehearing of the above entitled cause.

The position of the Plaintiff in error is stated by the Court in the opinion filed herein August 1, 1921, as follows:

> "The plaintiff in error contends that each count of the indictment is fatally defective in that it fails to show that the defendant was a person required to register under the Act, in that it contains no allegation that he was one of the persons who "import, manufacture, produce, compound, sell, deal in, dispense or give away opium," etc. This statement, while accurate as far as it goes, does not present the position of Plaintiff in error as fully as he desires.

> "Plaintiff in error, in this connection, respectfully requests that it be not forgotten that the indictment is also attacked on the ground that it cannot be ascertained therefrom which, if any, of the enumerated classes he belonged to."

The Court in its opinions considers alone the objections raised by Plaintiff in error to the third and fourth counts of the indictment, which charge, as therein observed, that the defendant "did knowingly, unlawfully, and wilfully *sell, dispense,* and *distribute*" derivatives of cocoa leaves.

This allegation is deemed to be sufficient to show that he was a person who was required to register under the Act in question. The sole authority for this conclusion appears to be the case of *Pierriero* vs. *United States,* 271 Fed. 913.

The case cited was one wherein the Plaintiff in error was charged under Section I of the Harrison Narcotic Act and the language there employed by the Court, so far as directly applicable here is as follows:

> "It is also contended that to convict under the amended section it must be alleged and proved 'that the accused is one of those persons required to register and pay the special tax,' even if untaxed and unstamped drugs be found in his possession. We are not of that opinion. The clause above quoted includes, not only those who purchase, but also those who sell and dispense, and the latter are specifically required to register and pay the special tax. Therefore an indictment in the language of the statute, charging that defendant 'did sell, dispense and distribute,' as in this case, alleges by necessary

> implication that he is within the class required to register. And if there be proof that unstamped drugs were found in his possession, the clause in question creates the presumption that he has violated the amended section. The burden is then upon him to show that he is not in the class required to register, and that his possession was not unlawful, as was held to be the case in *United States* vs. *Wilson* (D. C.) 225 Fed. 82."

This case does not, we respectfully submit, sustain the opinion of the Court in the case at bar. In the first place the case of Pierriero does not present a pure question of criminal pleading. In the case at bar the sole question is, does the indictment set forth a public offense under the statute in question in the light of the challenge, warning and demand contained in the demurrer of the defendant. No question of fact and no rule of evidence is here involved. This is not true of the case cited. It does not appear from the report that a demurrer was even interposed in the Pierriero case. The question here raised by Plaintiff in error was not there considered. There is nothing either in that case or any other that we can find depriving the accused of the right to a description of the offense attempted to be charged such as will enable him to prepare his defense and plead his jeopardy.

Under such an indictment as that before us no person can tell whether it is the intention of the government to attempt to prove that the accused is an importer or a manufacturer or a vendor or a dealer in narcotics; and if he should be tried as a

vendor, for instance, can it be said that after judgment he can not, upon the same indictment be again tried as a manufacturer.

A careful reading of the act in question will, we respectfully submit, render this contention peculiarly persuasive. Quite evidently it is against persons engaged in one of the classes of *business* therein referred to that the statute inveighs.

The very language of the first section of the Act positively substantiates this interpretation of the Act. The first section provides that "every person who produces * * * shall register * * * his *name or style, place of business, and place or places where such business is to be carried on:* provided, that the office, or if none, then the residence of any person shall be considered for the purpose of this act to be his *place of business.*"

And it is further provided in Section 1 that "all provisions of existing law relating to special taxes, so far as applicable, including the provisions of 3240 of the revised statutes of the United States, are hereby extended to the special tax herein imposed."

In construing an indictment under section 3242 of the Revised Statutes (one of the laws "relating to special taxes referred to in Section 1 of the Act), the Supreme Court, in the case of *Ledbetter* vs. *United States,* 170 U. S. 606, 18 Sup. Ct. 774, 42 L. Ed. 1162, said:

> "It is quite evident that an indictment averring in the language of section 18 (Comp. St.

> 1913, par. 5973), which defines a retail liquor dealer, that the defendant sold or offered for sale the liquors named, *without avering that he made this a business,* and that he had not paid the special tax required by law, would be insufficient."

Clearly, the rule laid down by the Supreme Court in the case of Ledbetter is applicable here. Neither of the counts to which the Court has referred charges that the defendant was conducting a business. On the contrary he is in each charged with a violation of the law because on one occasion he sold the article named.

Again we very respectfully direct the Court's attention to the language used by the Court in *United States* vs. *Carney,* 228 Fed. Rep. 163 (No. 11587):

> "It is axiomatic that statutes creating and defining crimes cannot be extended by implication or intendment, and before any one can be rightly punished under a statute creating an offense, the acts done by him must be plainly and unequivocally alleged to be within the offense as created (citing cases).
>
> "It is also a cardinal rule of criminal pleading that an indictment for an offense must *allege directly* and with certainty *every essential element* or ingredient of the offense and *not by way of recital or inference;* that it is not sufficient to allege it in the words of the statute unless those words of themselves set forth clearly, fully, and with certainty every essential ingredient of which the offense consists * * (In this case they have not even followed the words of the statute).

"With these principles in mind, the statute and indictment in question may be considered. Section 1 provides that on and after March 1st, 1915, every person who produces, imports, manufactures, deals in, dispenses, sells, distributes or gives away any of the drugs mentioned shall register with the proper revenue collector his name and place or places where such business is to be carried on and pay to the person or persons who engage in dealing in or in some manner handling the drugs as a *part of his or their business* that are to register and pay the required tax, and persons or associations not so engaged are not within its terms. The act is highly penal in its nature and must be so construed as to include only those who are clearly within its terms. * * * "

"It seems quite clear that the act in question is to be construed as one imposing a tax upon those who engage in dealing in and handling the drug mentioned *as a part of their business,* and that a *single* sale * * * * *by one not engaged in the business* of dealing in them, is *not* within the terms of the act."

The conclusion is inevitable, it seems to us, if the accused was entitled to a pleading which charged him with the offense in question *directly* and *not* by *way of inference*—the judgment in the case at bar ought to be reversed and the demurrer ordered sustained.

It is therefore respectfully submitted that a rehearing of this cause should be granted by this Honorable Court.

Dated, August 31, 1921.

NATHAN C. COGHLAN,
Attorney for Plaintiff in error.

CERTIFICATE OF COUNCIL.

I hereby certify that I am counsel for plaintiffs in error and petitioners in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition is not interposed for delay .

Dated, San Francisco, August 31, 1921.

NATHAN C. COGHLAN,
Counsel for Plaintiffs in Error and Petitioners.